

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No: **HBJ 5 of 2015**

IN THE MATTER for an Application for Judicial Review by **Vinodni Deo** under Order 53 of the High Court Rules 1988.

AND

IN THE MATTER of the **HOUSING AUTHORITY OF FIJI** refusing to grant consent.

THE STATE V HOUSING AUTHORITY OF FIJI

Respondent

EX PARTE : **VINODNI DEO**

Applicant

BEFORE : The Hon. Mr Justice David Alfred

Counsel : Ms L Lagilevu for the Applicant
Ms M Vasiti for the Respondent

Date of Hearing : 2 September 2015

Date of Judgment : 28 April 2016

JUDGMENT

1. This is the Applicant's Application for Judicial Review seeking the following Orders:

- A. An Order of Certiorari to remove and quash the decision of the Respondent made on 23 December 2014 to refuse to grant consent to transfer Lot 19, DP 3866, Nadera.
 - B. For a Declaration that the Respondent has acted, inter alia, against the rules of natural justice and/or in breach of the Applicant's legitimate expectations.
 - C. An Order of Mandamus directing the Housing Authority of Fiji to consent to the transfer of Lease No. 183928 (the said property).
 - D. Damages.
2. The hearing commenced with the Applicant's Counsel submitting. She said the Applicant had applied for consent which was not granted by the Respondent. There was a current proceedings in another High Court where the Applicant is suing the Respondent for compensation for removal of a fence. (As at the date of this judgment, I am made to understand that is still on foot). She has no document to show that the sale concerned has been aborted.
 3. The Applicant, firstly, contends that the Respondent did not act fairly and justly and that procedural fairness had not been adhered to, in that it failed to observe the procedural rules provided by Section 16(3) of the Housing Act (the Act) and the reason given by the Respondent was outside this.
 4. Secondly, the Respondent has exercised its absolute discretion in an unreasonable manner, in that it stated the application may be reconsidered after finalisation of the High Court action. This was a *Wednesbury* unreasonable decision.
 5. Thirdly, the Application's reasonable expectation was that she would be granted consent as there were no breaches by her of the lease. *Nair v Permanent Secretary for Education* shows that if an expectation was not met, judicial review applies. She had complied with section 16(3) of the Act.

6. Fourthly, she contended the Respondent abused its discretion in refusing consent.
7. With that Counsel concluded her submission.
8. Counsel for the Respondent then submitted. The Applicant was in breach by erecting a fence without the written consent of the Respondent. The other court action has a direct bearing on this application and its outcome is pivotal to this application. It is premature for the Applicant to say there is no breach until the determination of the pending suit, and in this the Respondent is acting reasonably, as it has a duty to regulate the terms of the lease. Section 16(3) of the Act should be read in conjunction with Clause 1-29 of the lease.
9. There was a breach of the terms of the lease, and there was no abuse because the Respondent never represented that if the pending suit were withdrawn then the consent would be forthcoming.
10. The Applicant's Counsel in her reply said the removal of the fence removes the basis for saying a breach occurred. Therefore denial of consent was not reasonable.
11. At the conclusion of the hearing, I informed that I would take time to consider my decision. In the course of reaching my decision, I have perused:-
 - (1) The Summons for Judicial Review.
 - (2) Affidavit in Support of Application for Judicial Review.
 - (3) Affidavit in Opposition.
 - (4) Written Submission of the Applicant.
 - (5) Written Submission of the Respondent.
 - (6) Authorities cited by both Counsel.
12. I now proceed to deliver my judgment. The material facts of this matter, from the Applicant's Affidavit, can be briefly stated as follows: The Applicant sought to

sell the said property as she and her husband wish to permanently reside in the United States. On 28 October 2014, she agreed to sell the said property to Peni and Yasilika Bulimaibu (Purchasers). As required by the Respondent she applied for its consent for the transfer to the Purchasers. The annexure "F" which was supposed to be the requisite form turns out to be, on closer inspection, an Application for Consent To Sublet to Nilu Nilesh Ram, at a monthly rental of \$330.00. This, is, in my opinion, a far cry from an application to sell/transfer the said property.

13. Be that as it may, section 16(3) of the Housing Act (Cap 267) provides the Authority (Respondent) shall make it a term of every letting that the tenant shall not assign, sub-let or part with the possession of the premises except with the written consent of the Authority which consent shall not be given unless it is satisfied a reasonable rent has been or is to be received by the tenant in consideration of such transaction.
14. It is therefore clear that this section cannot refer to the sale in question, because it is not a transaction where the Respondent can be satisfied that the consideration is a reasonable rent.
15. On the contrary, here the consideration for the sale/transfer is the sale price. The operative legal provision for this is to be found within the 4 corners of the Housing Authority sub-lease. This lays down it is subject to, inter-alia, the following covenants and provisos that is to say, Clause 2: *"The lessee shall not transfer mortgage assign sublet or part with the possession of or alienate or deal with the demised land or any building thereon or any part thereof without the written consent of the lessor first had and obtained which consent may be withheld in the absolute discretion of the lessor."*
16. The sale being a transfer of the said property would require such written consent of the Respondent.

17. The lessor had by its letter dated 23 December 2014 to the Applicant's solicitors stated, amongst other things, it is declining to grant consent to the said transfer pursuant to the above mentioned clause 2.
18. Can the above refusal be challenged in Court?
19. I, therefore, now turn to Stroud's Judicial Dictionary 6th edition, where it defines "sole and absolute discretion" (of trustees) meant their decision should be final and conclusive and not subject to correction by a court. To my mind, the additional word "sole" does not add to nor derogate from the meaning of the "absolute discretion" in clause 2 of the sub-lease here.
20. The judicial decision which is the basis for this definition is the decision of the House of Lords in *Dundee General Hospitals Board of Management v Walker and Another* [1952] 1 All E.R 897. (the Dundee Appeal).
21. Does the fact the Respondent provided reasons for its decision give me the liberty to examine and correct its decision? In my opinion, it does not. Adopting the words of Lord Normand in the Dundee appeal, the principles on which I have to proceed are the same whether the reasons for the lessor's decision are given or not.
22. I need also to express my decision on something which is more fundamental and it is this. Can the Applicant apply for judicial review of the Respondent's decision herein? After all she is in an analogous position to a tenant who has a dispute with her landlord because he refuses to give his consent, as he is entitled to, under a similar provision in the tenancy agreement. Such tenant might file an ordinary civil action seeking the court's determination of the issue. He would never contemplate applying for judicial review of the landlord's decision. Then why does the Applicant consider that she can invoke the court's powers to judicially review her (landlord) lessor's decision to refuse consent.

23. Is it because the Respondent is an entity of State? The answer to the question whether she is so entitled or not is to be found in considering what is the proper ambit of judicial review.
24. The decision of the English Court of Appeal in: *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All E.R page 425 throws light on the picture.
25. This was a case where the Applicant was employed by the Respondent health authority under a contract of employment. The authority terminated his employment and the applicant sought judicial review of the dismissal on the grounds, inter alia, of ultra vires and breaches of natural justice in the procedures leading up to the dismissal.
26. The Court of Appeal held that whether a dismissal from employment by a public authority was subject to public law remedies did not depend on the fact of employment by a public authority per se or the interest of the public in the functioning of the authority.
27. The Applicant here is by analogy in the same position as Walsh in the above appeal, whose application for judicial review was dismissed.
28. In my opinion, the fact that the Respondent is a public authority does not ipso facto entitle the Applicant to apply for judicial review of the Respondent's decision. There is no element of public law here which can attract the public law remedies of certiorari or a declaration. I discern the Applicant is ostensibly seeking "a public law remedy" when what she really desires is a purely "private contractual remedy" to overcome the purely private contractual decision of the Respondent to refuse to give its consent.
29. The decision of the New Zealand Court of Appeal in: *W E Wagener Ltd v Photo Engravers Ltd* [1984] 1 NZLR page 412, is distinguishable on its facts. There the relevant clause provided that the lessee must obtain the lessor's written consent before assigning the lease; the lessor's consent would not be arbitrarily or

unreasonably withheld to an assignment to a responsible and reputable assignee. The wording is different from that of the provision in the instant sub-lease and thus the decision will not be followed.

30. The decision of the English Court of Appeal in: *Bromley Park Garden Estates Ltd v Moss* [1982] 2 All ER page 890 will similarly not be followed because there the lease contained a provision that the lease was not to be assigned without the landlord's consent. Again, the wording is different.
31. I do not obtain much if any assistance from the authorities dealing with judicial review. The provision in the context of the instant case in my view, meant that the lessor was to be the sole judge of the matters that needed to be considered and of the conclusion to be arrived at and once it had reached a decision, that was to be final.
32. It bears reminding litigants and their solicitors that Lord Tucker in the Dundee Appeal said "It is, I feel, to be regretted that a provision so clearly intended to avoid expensive litigation should have resulted in a journey to your Lordship's House."
33. For all the above reasons, I shall dismiss the Applicant's Application for Judicial Review, decline to grant the orders prayed for therein and order the Applicant to pay the Respondent, costs which I summarily assess at \$1,000.00.

Delivered at Suva this 28th day of April 2016.




DAVID ALFRED
JUDGE of the High Court of Fiji